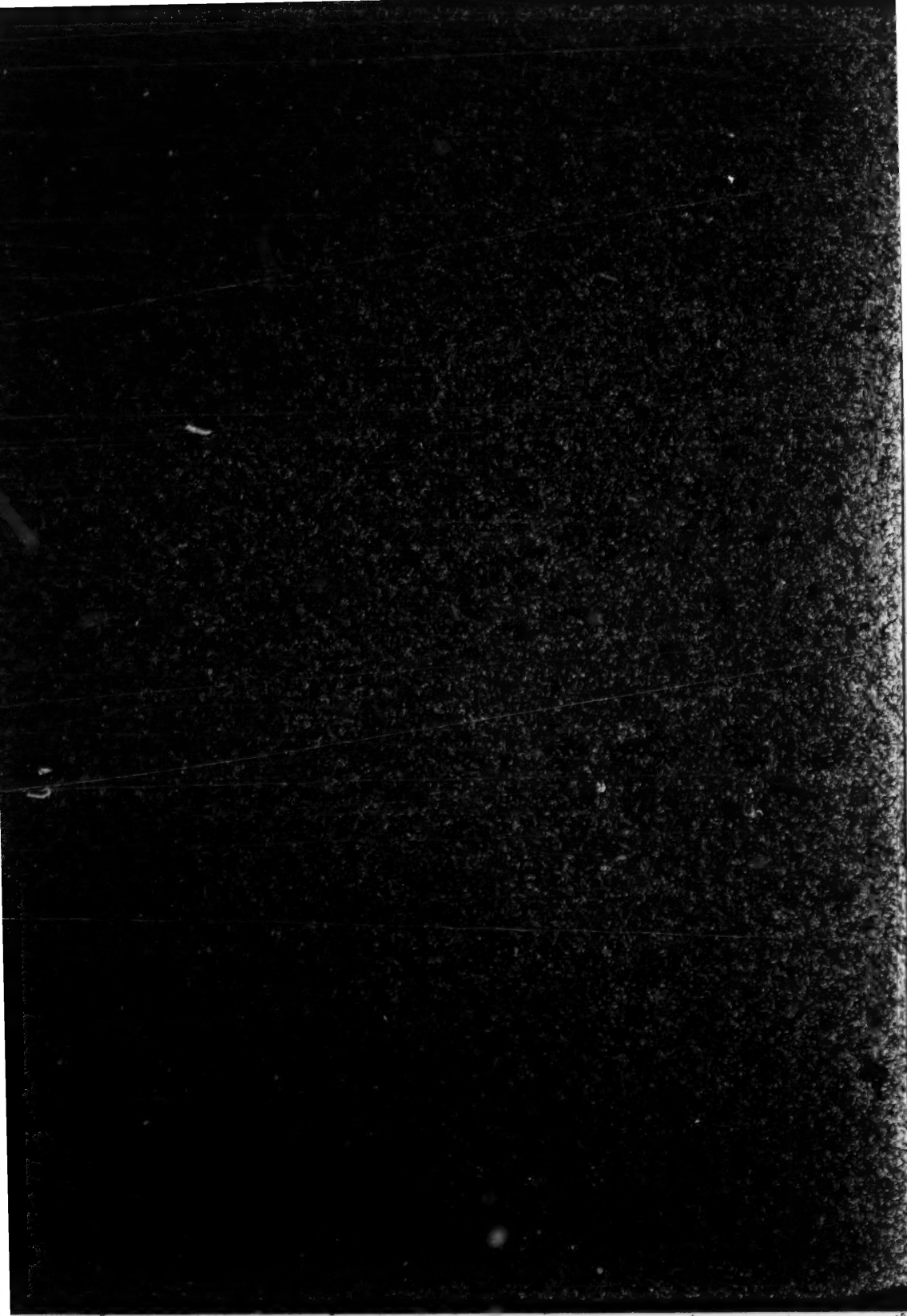

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OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming judgments of sentence is reported at 427 Pa. 284, 234 A. 2d 552 (1967) (Appendix A of Petition). The opinion of the trial court is unreported (Appendix B of Petition).

JURISDICTION.

Petitioner asserts that jurisdiction of this Court is invoked under 28 U. S. C. §1257(3). Respondent contends that this case presents no questions involving any right, privilege or immunity set up under the Constitution of the United States.

QUESTIONS PRESENTED.

1. Were any of petitioner's constitutional rights violated by the state court's refusal to quash the indictments?

2. Was due process violated by the state court's denial of a motion for a continuance on the basis of alleged prejudicial pre-trial publicity?

3. Did any of the various trial rulings complained of by petitioner violate due process?

4. Did examination of prospective jurors as to their conscientious scruples against capital punishment violate due process?

5. Does the imposition of the death penalty by a state court in a proper case violate any constitutional provisions?

6. Were the statements given by petitioner to the police at the scene of the killings and subsequently at the hospital admissible against him?

7. Was the denial of post-trial motions proper?

STATEMENT.

On July 15, 1964, petitioner, Jack Lopinson, following the conclusion of an inquest conducted by the Medical Examiner of the City of Philadelphia,[1] was charged with the murders of his wife, Judith Lopinson, and of his partner, Joseph Malito, and held for action of the grand jury. He was indicted on the same day. Later in the same month, Frank Phelan was arrested on a warrant charging him with the same murders, and, on July 26, 1964, after a hearing before a magistrate, Phelan was also held for action by the grand jury. On the following evening, July 27, Phelan summoned the senior officer of the prison and told him that he wanted "to confess who committed the murders." The homicide division of the Philadelphia police was notified and the following morning Phelan gave a detailed, recorded, factual description of the killings and the circumstances which led up to them. The taking of this statement was interrupted temporarily to enable Phelan to appear in court and testify, under oath, in a habeas corpus proceeding insti-

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[1] In Philadelphia, the Medical Examiner has replaced the former office of Coroner and possesses all the powers of a Coroner. **Philadelphia Code of Ordinances** §2-102 (enacted under authority of the **Philadelphia Home Rule Charter**, adopted April 17, 1951). These powers include those "relative to the investigation of sudden violent and suspicious deaths and the determination of whether the person or persons responsible shall be charged with crime."

tuted by Lopinson, wherein he sought his discharge on the ground, inter alia, that there was insufficient evidence to charge him with the crimes. The petition for habeas corpus was denied. Lopinson pled not guilty and went to trial before a jury.[2]

At Lopinson's trial Phelan appeared as a witness for the Commonwealth. On March 4, 1965, Lopinson was found guilty of murder in the first degree in each case and the jury fixed the penalty at death. Following dismissal of motions for new trial and in arrest of judgment by a court en banc, sentences were imposed in accordance with the jury's verdicts. Lopinson appealed to the Supreme Court of Pennsylvania. After extensive argument, wherein substantially the same matters now raised in the present petition were urged, the judgments were affirmed. *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A. 2d 552 (1967).

The facts relevant to this petition are: Early in the morning of June 19, 1964, about 3:30 a.m. Judith Lopinson, petitioner's wife, and Joseph Malito were shot to death in the basement office of a restaurant, known as Dante's Restaurant, located in Philadelphia's centre-city. At that time the restaurant was operated by Lopinson and Malito under a partnership agreement. The basic facts as to the murders are as follows:

Lopinson requested Phelan to kill both his wife and Malito for an agreed cash sum. Phelan agreed to perform the services. Shortly before the killings Lopinson drove Phelan in his automobile to the state of Delaware to secure the murder guns for which Lopinson paid the purchase price. The time and place for the commission of the killings were suggested by Lopinson; originally the crimes

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[2] Phelan, subsequently, pled guilty generally to two indictments charging him with the murders. After a hearing before a three-judge court, Phelan was found guilty of murder in the first degree in each case and sentenced to death. The judgments of sentence were affirmed by the Supreme Court of Pennsylvania: **Commonwealth v. Phelan**, 427 Pa. 265, 234 A. 2d 540 (1967).

were planned for two nights earlier but at the last minute were deferred. A few hours before the killings Phelan and Lopinson discussed and reviewed the final plans in Phelan's automobile. At Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and hid himself. He waited there for the restaurant to close and for Judith Lopinson and Malito to come from the first floor of the restaurant to the basement office to count the day's receipts. Upon their arrival Phelan entered the office with a gun in each hand and shot each victim in the head twice. Phelan went upstairs and reported the shootings to Lopinson; they returned together to the basement office and, upon discovering that neither Judith Lopinson nor Malito was dead, Phelan at the request and in the presence of Lopinson, fired two additional bullets into the heads of both victims. The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, viz., that the restaurant had been held up by two unknown men who had fatally shot Judith Lopinson and Malito and also shot Lopinson. To bolster this concoction, Phelan shot Lopinson through the fleshy part of his thigh. After Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the fabricated story about the restaurant robbery. (At his trial Lopinson admitted that the story he gave to the police was a lie. Since Phelan had already testified as to the shootings as above related, Lopinson abandoned his prepared version and gave another equally incredible explanation.)

From the evidence, the jury could have logically found that the purpose of the shooting was that Lopinson wanted to get rid of his wife for another woman, his mistress, and the killing of Malito would aid in solving Lopinson's substantial financial difficulties and render the false robbery story by two unknown intruders more plausible.

When Phelan left the premises he drove to a pier on the

Delaware River and threw the guns he used into the river. After his confession, Phelan directed the police to the area and the two guns were recovered. Ballistic tests established these guns as the murder weapons.

As we have previously indicated, Lopinson's trial was extensive; many witnesses were heard whose testimony supported and corroborated numerous aspects of Phelan's testimony.

ARGUMENT.

I. LOPINSON'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE REFUSAL OF THE STATE COURT TO QUASH THE INDICTMENTS.

Following the conclusion of an inquest conducted by the Medical Examiner of the City of Philadelphia,[3] Lopinson was held for action by the Grand Jury. On the same day (July 15, 1964) Lopinson was indicted by a Grand Jury which had already been in regular session for two weeks. Following the appointment of counsel for Lopinson, a motion to quash the indictments was filed. It was contended that no notice of the presentment of the bills to the Grand Jury had been given to Lopinson and thus he was denied the opportunity to investigate and challenge any member of the Grand Jury for cause or to challenge the array. The trial court fixed a time for hearing to afford Lopinson every opportunity to produce any pertinent facts. He produced nothing nor offered to produce any evidence to establish any challenge to any juror or to the panel. The motion to quash was denied.[4]

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[3] See **supra.** Note 1.

[4] An appeal was taken to the Supreme Court of Pennsylvania from the denial of the motion to quash the indictments. The appeal was quashed (January 15, 1965) for the reason that an order denying a motion to quash an indictment is an interlocutory order from which

At the time Lopinson was indicted (July 15, 1964) the law in Pennsylvania was that a challenge to the Grand Jury, or any member thereof, could be entered either before or after an indictment was returned, subject only to the limitation that it be entered before the plea to the indictment (see cases cited in the Opinion of the Supreme Court of Pennsylvania, 427 Pa. at 293, 234 A. 2d at 558; Petition p. 40). However, the record in this case is conclusive that, under the procedure existing at the time of the indictments, Lopinson was afforded every opportunity to exercise his rights of challenge and failed to produce any facts to support his allegations. A challenging of the array must be predicated on facts. "The courts will not permit a full scale investigation to be made of its jury panel until it is suspect." *United States v. Hoffa*, 349 F. 2d 20, 30 (6th Cir. 1965), *affirmed* 385 U. S. 293 (1966).

"Distinct evidence in support of the motion (to dismiss an indictment) must be offered. *Glasser v. United States*, 315 U. S. 60, 87, 62 S. Ct. 457, 86 L. Ed. 680 (1942). The evidence must be more than mere statements of counsel of what they hope they will be able to prove. *Frazier v. United States*, 335 U. S. 497, 503, 69 S. Ct. 201 (1948)." *Ibid.*

So far as this case is concerned, there was not the slightest indication that the Commonwealth of Pennsylvania failed "to furnish an unbiased body," assuming that "the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a Grand Jury procedure, (to) . . . furnish an unbiased Grand Jury." *Beck v. Washington*, 369 U. S. 541, 546 (1962).

Due process was afforded to Lopinson. He was given "the opportunity to be heard." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). The Pennsylvania Courts fully recognized the right to challenge and afforded Lopinson the opportunity to do so. Due process requires no more.

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no appeal lies until after conviction and sentence. The issue was raised in Lopinson's appeal from sentences and was fully considered and rejected by the Pennsylvania Supreme Court. 427 Pa. at 292-93, 234 A. 2d at 558-59.

Reference is made in the Petition to a case recently decided by the Supreme Court of Pennsylvania, *Commonwealth v. Dessus*, 423 Pa. 177, 224 A. 2d 188 (1966). Petitioner contends *Dessus* should have been applied to him. Dessus was indicted on May 10, 1966, which was *after* the effective date of Pennsylvania Rule of Criminal Procedure 203 (effective date, January 1, 1965).[5] This Rule provides that any challenge to the Grand Jury must be made "before the (grand) jurors are sworn unless opportunity did not exist prior thereto; in any event a challenge must be made before the bill of indictment is submitted to the Grand Jury. . . ." Since Dessus was indicted *after* the effective date of the Rule and was indicted on the very same day he was held for the Grand Jury, it was held that his "opportunity for challenging within a reasonable time the array or proving by legally competent evidence that one or more of the Grand Jurors should be disqualified for cause, did not exist before the bill of indictment was submitted to the Grand Jury and consequently defendant was effectively denied due process of law" (423 Pa. at 189, 224 A. 2d at 194-195).

In Lopinson's appeal to the Pennsylvania Supreme Court from his sentences, he raised the *Dessus* issue. The Court pointed out that at the time Lopinson was indicted Rule 203 was not in effect; the Pennsylvania law which was in effect permitted a challenge to the Grand Jury *either before or after* an indictment; Lopinson was afforded full opportunity to show that the Grand Jury was illegally impaneled or that any member thereof was unqualified to sit (427 Pa. at 293, 234 A. 2d at 558). He failed to present any facts in support of his claims and Due Process does not require that a movant be successful. Nor does the Constitution require retrospective operation of any given rule. *E.g., Johnson v. New Jersey*, 384 U. S. 719 (1966).

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[5] Lopinson was indicted on July 15, 1964.

II. THERE WAS NO DENIAL OF DUE PROCESS IN THE REFUSAL OF THE TRIAL COURT TO POSTPONE THE TRIAL BECAUSE OF ALLEGED PREJUDICIAL PRE-TRIAL PUBLICITY.

Petitioner complains that the pre-trial newspaper publicity concerning these crimes required an indefinite postponement of trial and that the refusal to grant a motion for such a continuance amounted to a denial of due process. The circumstances of the killings, the story Lopinson gave to the police on their arrival, and other events which developed thereafter, unquestionably created the background for considerable publicity. However, publicity, per se, is not the prime issue. Rather the real issue is whether unfair and prejudicial news comment in pending trials have so infected the community as to deprive a defendant of "a trial by an impartial jury free from outside influence." *Sheppard v. Maxwell*, 384 U. S. 333, 362 (1966). The samples of newspaper publicity, prior to the trial in the instant case, which petitioner has furnished in Appendix "E," do not remotely approach the publicity which occurred in *Sheppard v. Maxwell*. It was no different in substance and quality than the publicity which occurred in *Beck v. Washington*, 369 U. S. 541 (1962), wherein your Honorable Court said, "We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law." *Id.* at 557.

The murders occurred on June 19, 1964. Lopinson was arrested July 15, 1964. In October 1964, Lopinson filed a motion for change of venue, alleging prejudicial publicity. The Commonwealth's answer denied that the publicity had been prejudicial, but, nevertheless, expressly stated that there was no objection to a change of venue. Lopinson

withdrew his motion shortly thereafter without further explanation.

The trial began on January 19, 1965, more than six months after the arrest. Prior to trial and again during the voir dire of prospective jurors, Lopinson's counsel moved for a continuance on the grounds that newspaper publicity rendered it impossible to secure a jury free of bias and prejudice. The motions were denied.

Extensive voir dire examinations were had of 250 prospective jurors. As each juror was selected he or she was immediately sequestered and remained so until the verdicts were recorded.

Two of the jurors selected had read nothing about the case; two others were not asked by counsel whether they had read anything; several had read news accounts superficially. Each juror selected clearly indicated that he had formed no opinion, would listen to the evidence with an open mind, was free from bias and would be unaffected by anything he or she might have read or heard about the case. *Not a single juror selected was challenged for cause,* and the record does not disclose any valid cause for challenge as to any juror selected. "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington,* 369 U. S. at 557, 558.

Petitioner here attempts to equate the present case with what occurred in *Sheppard v. Maxwell.*[6] As we have stated above there is not the slightest resemblance between the cases. In *Sheppard v. Maxwell* it is clear that there was not only massive newspaper publicity, but there existed editorial attacks on the defendant; his guilt was assumed; there was radio and television coverage of the trial; the courtroom was almost taken over by the news media. Your

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[6] 384 U. S. 333 (1966).

Honorable Court characterized the proceedings as having been conducted in a "carnival atmosphere."[7]

By comparison, Lopinson's trial was free from any prejudicial incidents. It was conducted in a proper and judicial atmosphere. The attempt to compare Lopinson's trial with that of Dr. Sheppard is without any justification.

Finally, on this issue, petitioner's reference to the holding in *Sheppard v. Maxwell* (Petition p. 23) is incomplete. Your Honorable Court said (384 U. S. at 362-363), "Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, *or transfer it to another county not so permeated with publicity.*" (Emphasis added.)

Not only was the newspaper publicity in Lopinson's case not of a nature as to prevent a fair trial, or prevent the procuring of an impartial jury, but he had a fair trial by a fair and impartial jury and furthermore he was afforded an opportunity to obtain a change of venue to another county and voluntarily rejected it. His request for an indefinite continuance was without justification and the denial of that request was not even error let alone a violation of due process.

III. NONE OF PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS WERE VIOLATED BY VARIOUS TRIAL RULINGS.

Petitioner has referred to various matters which occurred during the trial wherein the trial Judge made rulings adverse to petitioner. These matters include rulings on admissibility of evidence, rulings during the voir dire exami-

[7] We have not undertaken to refer to many other clearly prejudicial occurrences noted in the opinion.

nation of jurors, and rulings on various other matters that occurred during the trial. Most of the matters complained of here were raised by petitioner in his appeal to the Supreme Court of Pennsylvania, considered and duly answered in the opinion of that Court sustaining the judgments of sentence. The petitioner here does not seriously contend that any one of the complaints included in this category standing alone could support an argument that petitioner was deprived of due process or reached constitutional stature. He seems to urge that "the aggregate add up to an unfair trial and a denial of due process" (Petition, footnote p. 3).

Your Honorable Court has had occasion frequently to state the extent of federal review of state criminal trials and when such review should be exercised.

It was said in *Rochin v. California,* 342 U. S. 165, 168 (1952):

> "Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, 'we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from State courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.' Malinski v. People of State of New York, 324 U. S. 401, 412, 418. Due process of law, 'itself a historical product,' Jackman v. Rosenbaum Co., 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."

See *Buchalter v. New York,* 319 U. S. 427, 429, 430 (1943).

A more recent discussion by this Court of the principle

involved can be found in *Spencer v. Texas*, 385 U. S. 554, 562-64 (1967).

In *Lisenba v. California*, 314 U. S. 219, 236 (1941), Your Honorable Court, in determining the application of the Due Process Clause to a State trial, said,

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

In the light of these principles we reach the various rulings complained of:

(a) The admission in evidence of testimony alleged to be hearsay.

The Pennsylvania Supreme Court noted that the few instances referred to "had no influence on the verdict" and must be deemed harmless error. The Court further observed, "Some error in a protracted trial, such as this, will unfortunately occur, but we have consistently ruled that if the error did not deprive the defendant of the fundamentals of a fair trial, we will not reverse the conviction" (427 Pa. at 307, 234 A. 2d at 565).

Federal law as to harmless error is clear. "Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may be disregarded, even in the review of criminal trials." *Brown v. Allen*, 344 U. S. 443, 460 (1953). Of course we are not here dealing with the harmless error standards as to specific constitutional provisions. See *Chapman v. California*, 386 U. S. 18 (1967).

(b) The alleged limitation of examination of jurors on their voir dire.

The record does not support this complaint. A total of 250 individuals were examined before twelve jurors and two alternates were selected. The examination lasted from January 19 to January 28, 1965. There was little restriction on the scope of the examination. Where there was limitation by the trial Judge it was in full compliance with Pennsylvania law and federal rulings.

In *Commonwealth v. McGrew*, 375 Pa. 518, 525, 526, 100 A. 2d 467, 470 (1953), it was said,

> "While considerable latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications of a juror and whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause . . .
>
> It is also well settled that the scope of the voir dire examination rests in the sound discretion of the trial Judge and his decisions, even in a challenge for cause, will not be reversed in the absence of palpable error."

This is also federal law. *E.g., United States v. Sferas*, 210 F. 2d 69, 75 (7th Cir. 1954), certiorari denied, 347 U. S. 935 (as to the qualifications of a juror resting in the discretion of trial Judge); *United States v. Bowe*, 360 F. 2d 1, 9 (2nd Cir. 1966), certiorari denied, 385 U. S. 961 (as to discretion of trial Judge in the conduct of voir dire examination).

(c) The rulings of the trial Judge as to conduct of the witness, Phelan, while testifying.

Two complaints relate to this witness: First, that while testifying for the Commonwealth and during cross-exami-

nation he wore sunglasses and would not remove them,[8] and, second, his refusal to answer several questions put to him on cross-examination. Phelan's direct examination covers 41 pages of the trial transcript as printed; his cross-examination covered 504 printed pages. The cross-examination was rigid, exhaustive and frequently repetitive. The fact that Phelan refused to remove the sunglasses while testifying in chief was repeatedly brought to the jury's attention during trial and in counsel's summation. As the Pennsylvania Supreme Court pertinently noted in its opinion (427 Pa. at 304, 234 A. 2d at 564), Phelan's actions, undoubtedly, were more helpful than harmful to defendant's case, especially where the trial judge in his charge referred to the incident and permitted the jury to draw inferences, unfavorable to the witness' credibility, from his refusal to remove the glasses. It is difficult to see where petitioner can claim to have been prejudiced and surely there is no constitutional right here involved.

For a similar reason, Phelan's refusal to answer several questions put to him did not constitutionally infringe upon Lopinson's right to cross-examine. Many of the questions which Phelan, at first, refused to answer, were eventually answered in response to subsequent questioning. When this extensive record is thoroughly examined, it is discovered that only two facts were undisclosed at the conclusion of Phelan's cross-examination, (1) where he purchased dope pills which he admitted using, and (2) the specific location where he and Lopinson fire-tested the murder weapons after they were purchased and before the killings. It appears to be clear that neither fact has any bearing on Phelan's credibility and may well have been ruled out as beyond the scope of cross-examination. It cannot be argued that cross-examination of Phelan was unreasonably limited. Moreover, "the scope of cross-examination lies pretty largely within the discretion of the Trial

[8] When he testified later in rebuttal he appeared without the sunglasses.

Judge." *United States v. Toner*, 173 F. 2d 140, 144 (3rd Cir. 1949). These complaints, obviously, do not involve federal constitutional rights.

(d) The testimony of rebuttal witnesses as to reputation of Lopinson.

Lopinson not only testified in his own behalf but also called witnesses to testify as to his good reputation as a law-abiding citizen. It is clear that by testifying Lopinson placed his credibility in issue and by calling the witnesses he put his reputation in issue.

> "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to whom that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue."

Michelson v. United States, 335 U. S. 469, 479 (1948).

That some of the witnesses the prosecution called in rebuttal characterized Lopinson's reputation as that of a "liar," or "scoundrel" was part of the "price" Lopinson was required to pay by putting his alleged good name in issue. If the two rebuttal witnesses embellished their testimony, so did some of the witnesses called by the defense. Certainly this did not constitute infringement of Fourteenth Amendment rights, especially where the Pennsylvania Supreme Court evaluated the complaint and determined that the failure of the trial judge, under all circumstances, to limit the answers of the witnesses was "not of such moment as to require a new trial."

(e) The quashing of a subpoena duces tecum requested by petitioner.

During the course of this lengthy trial Lopinson's attorneys served upon the Police Commissioner of Philadelphia and upon the District Attorney subpoenas duces tecum calling for the production "of all records, tapes, and/or transcripts thereof and/or reports and transcripts of telephone conversations emanative from or to (a certain telephone number)...."

The District Attorney moved to quash the subpoenas. A side-bar hearing was held. Lopinson's counsel reiterated that "I want all tapes, transcripts, et cetera, of any conversations that they have in their possession emanating from or to the phone of Nate Lopinson (petitioner's father)."

During the hearing no information was furnished to the trial judge as to the purpose and object of the subpoenas. It was not established that any such records existed; it was clearly not indicated that petitioner intended to use such material as evidence for the defense. The trial judge therefore quashed the subpoenas.

The doctrine of discovery is a stranger to criminal procedure. This is Pennsylvania law. *E.g., Commonwealth v. Caplan*, 411 Pa. 563, 192 A. 2d 894 (1963). "At the very least, a defendant should be required to present exceptional circumstances and compelling reasons." *Id.* at 567, 192 A. 2d at 896. None were shown here. Even under Rule 17(c), Federal Rules of Criminal Procedure, an application to compel the government to produce evidence, the equivalent of the traditional subpoena duces tecum, is granted "only where in the discretion of the court, it is necessary that he do so in order to make use of the material as evidence." *United States v. Murray*, 297 F. 2d 812, 821 (2nd Cir. 1962), cert. denied, 369 U. S. 828.

"An application for relief under these rules (Rule 16

and Rule 17(c)) is a matter within the sound discretion of the court, and the controlling test is whether there was an abuse of discretion." *Gevinson v. United States*, 358 F. 2d 761, 766 (5th Cir. 1966), cert. denied, 385 U. S. 823.

Tested by federal standards, it is obvious that the subpoena was intended to fish for evidence, and, more importantly, no necessity was shown. The court's exercising of its discretionary power presents no federal question.

(f) The alleged withholding of evidence.

Petitioner here, in his statement of Questions Presented (No. 9, at p. 5), in his Statement of the Case (at p. 15), and in his Reasons for Granting the Writ (at p. 28) refers to alleged withholding by the prosecution of evidence which "may have been helpful to the accused." Petitioner stated (p. 15) that this issue was raised on appeal to the Supreme Court of Pennsylvania and that in its opinion the Supreme Court "makes no mention or reference to this error."

We have reexamined petitioner's Brief submitted to the Supreme Court of Pennsylvania on his appeal. It consisted of 167 printed pages. In his brief Lopinson argued 23 different issues. Lopinson did not complain to the Supreme Court of Pennsylvania, as he does here, that statements of witnesses or evidence "which may have been helpful to the accused" were withheld from petitioner. Nor does he even specify here what statements or evidence are alleged to have been withheld, except a vague assertion that if he had been permitted to inspect "all" records in possession of the police he might have come across some material that might have been helpful to him. *The clear fact is that every statement taken by the police and prosecuting authorities of every witness, if it existed, and specifically of the witness, Phelan, was made available to and furnished to the defense.* There is no semblance of violation of the principles set forth in *Jencks v. United*

States, 353 U. S. 657 (1957), or in cases like *Brady v. Maryland*, 373 U. S. 83 (1963). The prosecution in the instant case withheld no evidence from Lopinson which would have tended to help his defense and it is obvious from the vague allegations in his present petition that he can point to no such violation of his rights.

(g) The exhibition of color slides.

During the examination of a witness, Dr. Joseph E. Campbell, a forensic pathologist employed in the office of the Medical Examiner of the City of Philadelphia, called by the State, to testify as to various matters, use was made of certain color slides made from photographs taken at the scene of the killings while the bodies of the two victims were in the positions where the police found them. These photographs were exhibited for the purpose of enabling Dr. Campbell to explain to the jury certain aspects of his testimony. Before the photographs were exhibited Dr. Campbell was asked:

"Q. Doctor, in your testimony would the showing of slides to the Jury aid you in giving your testimony?"

He replied:

"A. Yes." (Record 2882a).

The photographs were used to demonstrate the location of the bodies, the position of the bodies in relation to other objects in the office, the location, nature, character and extent of the wounds, the point of entry of the bullets and the severity of the assaults (Record 2883a-2884a). This evidence was material because Lopinson denied that the killings were deliberate assassinations performed at his behest.[9]

[9] It will be recalled that Phelan testified that after the shootings Lopinson came down to the basement office, was not satisfied that the victims were dead and commanded Phelan to again shoot each of the victims twice in their heads.

Under the strict supervision of the trial judge a number of slides were briefly exhibited on a four foot screen in a fully lighted courtroom (Record 2896a). The exhibition of each slide varied in time from 32 seconds to 93 seconds (Record 2901a et seq.). The point which Dr. Campbell desired to make as to each slide was quickly stated by him and the slide was then removed.

It is the law of Pennsylvania that color slides showing the body of deceased may be exhibited to the jury "to show the nature of the wounds and the severity and violence of the assault." *Commonwealth v. Raymond*, 412 Pa. 194, 206, 194 A. 2d 150, cert. denied, 377 U. S. 999 (1963).

The only limitation is that there be no "overuse;" the fact "that the exhibits were not pleasant to the eye does not require their exclusion." *Ibid.*

As recently as January, 1968, the Supreme Court of Pennsylvania said in *Commonwealth v. Powell*, 428 Pa. 275, 278, —— A. 2d —— (1968),

> "... (T)he admission of photographs exhibiting the body of a deceased in homicide cases is primarily within the discretion of the trial judge. Unless there is a flagrant abuse of discretion, this Court has been loath to conclude that reversible error exists. . . . We are of the opinion that the proper test to be applied by a trial court in determining the admissibility of photographs in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors."

Federal law is in accord. See, e.g., *Maxwell v. United States*, 368 F. 2d 735, 740 (9th Cir. 1966). The complaint as to the exhibition of the slides was made to the State Courts in the instant case and was not sustained. This does not present a federal question. The issue is one of a state court interpreting its rules of evidence. Your Honorable Court said recently in *Spencer v. Texas*, 385 U. S. 554, 563 (1967),

> ". . . (T)his Court was not the best forum for developing rules of evidence and would, therefore, not proscribe the long-standing practice at issue. A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts . . ., but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts."

Your Honorable Court further said (at 563-564),

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule making organ for the promulgation of state rules of criminal procedure."

Pennsylvania Courts evaluated the propriety of the use of color slides in the present case and concluded that they were properly exhibited to the jury.[10] No issue of due process is presented.

IV. THE EXAMINATION OF PROSPECTIVE JURORS AS TO THEIR CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

We are cognizant that on January 15, 1968, Your Honorable Court granted certiorari in two cases (*Witherspoon v. Illinois* and *Bumpers v. North Carolina*) to consider the question whether state law which provides, or permits, challenges for cause, in a capital case, of prospective jurors who were opposed to, or had conscientious scruples against capital punishment deprives defendant of a jury which

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[10] The photographs, copies of which appear in the trial record, were not seen or taken out by the jury.

fairly represents a cross-section of the community, and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence in violation of a defendant's rights under the Sixth and Fourteenth Amendments.

Pennsylvania has consistently held that such an inquiry does not violate a defendant's constitutional rights.

> "The purpose (of such inquiry) was not to obtain information as to the verdict which the juror would render upon the production of certain evidence, but whether he could consistently render a verdict such as the law contemplated, if the testimony established guilt beyond a reasonable doubt." *Commonwealth v. Bentley*, 287 Pa. 539, 546, 135 A. 310, 313 (1926).
>
> "It is essential in the trial of cases, particularly where there is a possibility of a death penalty, to secure jurors who are free from prejudices or fixed opinions with respect to the matters in issue, in order that an impartial verdict may be reached." *Commonwealth v. Pasco*, 332 Pa. 439, 445, 2 A. 2d 736 (1938).

This is also the ruling in other states. It is the law in federal courts: *E.g., Turberville v. United States*, 303 F. 2d 411, 420 (D. C. Cir. 1962). Your Honorable Court said in *Logan v. United States*, 144 U. S. 263, 298 (1892):

> "As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on voir dire that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevents him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence is not an impartial juror."

We cannot foresee what view Your Honorable Court will adopt in considering the cases wherein certiorari has been

granted. But one fact stands out clearly. Pennsylvania (and other states) have followed a legal principle which bears the imprimatur of Your Honorable Court for almost a century. Whatever may result from a reconsideration of this issue, it can be assumed, with reasonable certainty, that any newly declared principle will not be held to apply retroactively to cases tried before it was enumerated.

Considering the reliance which the courts have placed on the "virtually unanimous weight of authority" including that of Your Honorable Court, on this subject, application of any new principle (not even declared) to trials fully completed "would seriously disrupt the administration of our criminal laws." *Stovall v. Denno*, 388 U. S. 293, 300 (1967); *Johnson v. New Jersey*, 384 U. S. 719, 731 (1966).

V. THE IMPOSITION OF THE DEATH PENALTY BY A STATE COURT IN A PROPER CASE DOES NOT VIOLATE ANY CONSTITUTIONAL PROVISIONS.

Petitioner seeks to have Your Honorable Court consider whether state law which permits imposition of the death penalty for murder in the first degree violates federal constitutional rights. He refers to Eighth Amendment proscription against "cruel and unusual punishments" which he says should be incorporated with the Fourteenth Amendment's requirement that no state shall "deprive any person of life . . . without due process of law."

He also refers to the additional requirement of the Fourteenth Amendment that a state may not "deny to any person within its jurisdiction the equal protection of the laws."

We first observe that the due process provision does not prohibit a state from depriving a person of life. In fact, it recognizes the propriety of the death penalty because it expressly states that no person shall be deprived of his life "without due process of law." The validity of the imposition of the death penalty depends, therefore, solely on the

question whether a defendant received due process. Unless the Fourteenth Amendment be further amended so as to declare that a state may not impose the death penalty in any case, it is clear that the very Fourteenth Amendment which petitioner relies upon is against his present argument. The further argument predicated on the "equal protection of the laws" provision is based on the contention that the imposition of the death penalty on some defendants and the imposition of life imprisonment on others denies equal protection. It is obvious that so long as a sentence is within the maximum provided by law, a defendant may not complain of unequal protection merely because other persons, in justifiable cases, may receive less than the maximum sentence. Such a contention as is here advanced was recently held to be "frivolous." *Overstreet v. United States*, 367 F. 2d 783 (5th Cir. 1966).

Moreover, Your Honorable Court expressly said, "So long as the law applies to all alike, the requirements of equal protection are met." *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 465 (1947).

All persons charged with murder in Pennsylvania, if convicted of murder in the first degree, may be sentenced to death or receive life imprisonment depending on the facts and circumstances of each case as determined by the jury after it rendered its verdict of guilty. This petitioner received equal treatment with all other persons convicted of murder.

This brings us to the final argument, that the imposition of the death penalty, per se, constitutes a cruel and unusual punishment and, by incorporation with the Fourteenth Amendment should be declared a deprivation of due process.

It is unquestioned that this has never been so declared in any reported case, state or federal.

Your Honorable Court had frequently been importuned to declare the death penalty to be violative of the constitutional on various grounds, especially on the theory that

it constitutes a cruel and unusual punishment. Frequently this has been urged in behalf of defendants who had been convicted of crimes other than murder. This Court has consistently refused to find any constitutional proscription of the death penalty.

We cite a few of these cases: *Wilkerson v. Utah,* 99 U. S. 130 (1878); *In Re Kimmler,* 136 U. S. 436, 447 (1890); *Weems v. United States,* 217 U. S. 349, 371 (1910); *Trop v. Dulles,* 356 U. S. 86 (1958).

In *Trop v. Dulles,* Your Honorable Court said (356 U. S. at 99),

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

This being the present conception there is no need to argue the appropriateness of the death penalty in the instant case, where we have a cold-blooded assassination of two persons, the wife and business partner of this petitioner, for the most sordid motives.

VI. THE STATEMENTS GIVEN BY PETITIONER TO THE POLICE AT THE SCENE OF THE KILLINGS AND SUBSEQUENTLY AT THE HOSPITAL WERE ADMISSIBLE AGAINST HIM.

When the police arrived at the scene of the killings they found petitioner with a bullet wound in his thigh. He informed the police that the restaurant had been held up by two unknown men, who shot the victims during the robbery and who also shot petitioner. Petitioner was removed to a nearby hospital where, while petitioner was receiving

first aid treatment, other police officers interrogated him for the purpose of obtaining a description of the two alleged hold-up men. Since petitioner, at his trial, frankly admitted that his story was a falsehood and was pre-arranged by him and Phelan, his earliest statements to the police were, of course, introduced in evidence at trial. It is now contended that these oral statements violated petitioner's rights declared in *Miranda v. Arizona*, 384 U. S. 436 (1966).

This case was tried long before the effective date of *Miranda* and thus *Miranda* is not applicable. *Johnson v. New Jersey, supra.* Petitioner was not a suspect, either at the scene or in the hospital; he was not in police custody nor even detained by any police order. It is patently clear that the *Miranda* procedures apply only "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning. . . ." *Miranda* at 478.

Also it is said in *Miranda* (at 477-78), "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."

We strongly urge that even were *Miranda* applicable to this case, petitioner's complaints here are without the slightest merit.

A further contention, here made, that because the police officers suspected that petitioner might not have told the truth concerning the unknown hold-up men when they spoke to him at the hospital made him a "suspect" and therefore entitled to full *Miranda* warnings prior to questioning is answered (in addition to the fact that the trial was pre-*Miranda*) by the observation that petitioner was

not in custody, that police were engaged in their legitimate function of fact-finding and that the statements volunteered by petitioner were given freely, and as was learned later, in accordance with a calculated plan.

VII. THE DENIAL OF POST-TRIAL MOTIONS WAS PROPER AND RAISES NO CONSTITUTIONAL ISSUES.

After petitioner's conviction, motions for a new trial and in arrest of judgment were filed without specifying specific reasons other than the usual pro forma ones. As is the practice in Pennsylvania, petitioner's counsel was given ample time to specify all alleged errors after the trial transcript was filed. Petitioner's counsel then filed 57 additional reasons in support of his motions and argument was heard before the court en banc. Thereafter, and before the court rendered its decision, petitioner filed another petition to enter supplemental reasons in support of his post-trial motions, alleging that petitioner's counsel had "medical proof" of the incompetency of the state's principal witness, Phelan. Phelan's competency as a witness was the subject of considerable investigation prior to and during the trial. His competency was conclusively established. In their post-trial petition, stating that counsel had "medical proof" of Phelan's incompetency, nothing was furnished to indicate what the proof consisted of. In view of the extensive medical testimony presented to the court during the trial as to Phelan's competency as a witness, which was established beyond any doubt, what "medical proof" could petitioner have had other than the possible testimony of another physician who might have expressed an opinion contrary to those given at trial? Denial of the motion under these circumstances by a court which heard extensive medical testimony on the subject was clearly within its discretion and surely presents no constitutional question.

CONCLUSION.

It is respectfully requested that the petition for a writ of certiorari to the Supreme Court of Pennsylvania be denied for the foregoing reasons.

Respectfully submitted,

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